**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **STANLEY KORTHANKE** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 220,101 |
| **SCHWAN'S SALES ENTERPRISES** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **CONTINENTAL CASUALTY COMPANY** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent appeals from the preliminary hearing Order of Administrative Law Judge Bryce D. Benedict dated October 24, 1997, wherein the Administrative Law Judge granted claimant benefits finding that claimant suffered accidental injury arising out of and in the course of his employment with respondent and that claimant had just cause for failing to give notice within ten days of the date of accident pursuant to K.S.A. 44-520.

### ISSUES

(1) Whether claimant suffered personal injury by accident arising out of and in the course of his employment with respondent on the date or dates alleged.

(2) Whether claimant gave notice and, if not, whether claimant had just cause for failing to provide notice pursuant to K.S.A. 44-520.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant alleges accidental injury from July 15, 1996, through August 19, 1996, while employed with respondent. The injury alleged is to claimant's left hand. Respondent contends claimant failed to prove accidental injury on the date or dates alleged and further alleges claimant failed to provide appropriate notice under K.S.A. 44-520.

The medical evidence in this case is extremely limiting, consisting only of the October 24, 1996, report of Dr. L. R. Searight of Hiawatha, Kansas. Dr. Searight found that claimant's carpal tunnel syndrome "is possibly related to his work. I am unaware of any outside activities which may be related to this."

It is significant that the doctor failed to say within a reasonable degree of medical probability that claimant's condition is related to his work. However, claimant testified that he experienced symptoms regularly while working for respondent. Claimant's description of his work is uncontradicted by respondent. Further, claimant's testimony that he experienced symptoms while at work is also uncontradicted by respondent. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146(1976).

Respondent has submitted several videotapes of claimant working on his house subsequent to his termination of employment with respondent. Claimant acknowledged during cross-examination by respondent's attorney he was working construction on his own house and made no attempt to hide this fact. It was also claimant's testimony that his hand condition worsened subsequent to leaving his employment with respondent but before the construction activities began. The Appeals Board finds that claimant's testimony that he was performing no physical activities during the period August 1996 through February 1997 is uncontradicted and that the worsening of claimant's condition is a natural and probable consequence of the original injury. The videotapes, taken of claimant several months after this time period, are not sufficient to contradict claimant's testimony of ongoing symptomatology immediately after his termination of employment with respondent.

In reviewing the decision of the Administrative Law Judge the Appeals Board acknowledges the Administrative Law Judge's advantage in being able to assess the credibility of witnesses who testify live before him. In this case, the evidence from the claimant, from Mr. Perry Quenzer, and Mr. Dale Jackson were all held live before the Administrative Law Judge. In rendering his decision in claimant's favor, the Administrative Law Judge accepted the testimony of claimant over that of the other witnesses. The Appeals Board pays deference to the Administrative Law Judge's ability to assess the credibility of these witnesses and finds, for preliminary hearing purposes, that claimant has

proven accidental injury arising out of and in the course of his employment with respondent.

With regard to the date of accident, the Appeals Board finds pursuant to Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), that claimant's date of accident constitutes a series of accidents from July 15, 1996, through August 14, 1996, the last date claimant performed services for respondent as a delivery truck driver.

With regard to whether claimant provided notice of accident in a timely fashion, the Appeals Board cites McIntyre v. A. L. Abercrombie, Inc., 23 Kan. App. 2d 204, 929 P.2d 1386 (1996) in support of its finding that claimant has provided notice within the statutory limitations of K.S.A. 44-520. The statute obligates claimant to provide notice within ten days of the date of accident. In computing this ten-day time limitation, the rules set forth in McIntyre must be considered. In McIntyre the Court of Appeals found the method of computing a ten-day period under the Workers Compensation Act to be controlled by K.S.A. 60-206. The language of that statute provides that in computing any time when the time prescribed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays are excluded from the computation. This method was incorporated into the Workers Compensation Act effective July 1, 1997, in H.B. 2011. Respondent acknowledges claimant contacted its national office in Marshall, Minnesota. Claimant testified that he contacted the office in Marshall, Minnesota, the day after his August 27, 1996, medical examination. This would make claimant's telephone contact with Minnesota August 28, 1996, exactly ten days after August 14, 1996, when using the computation method of McIntyre. As such the Appeals Board finds claimant has provided notice in a timely fashion pursuant to K.S.A. 44-520 and K.S.A. 60-206.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bryce D. Benedict dated October 24, 1997, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this ____ day of December 1997.

BOARD MEMBER

c: Roger D. Fincher, Topeka, KS
Frederick J. Greenbaum, Kansas City, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director